



APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 93-1092, 93-1100

ACTION FOR CHILDREN'S TELEVISION; AMERICAN CIVIL LIBERTIES UNION; THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.; CAPITAL CITY/AMERICAN BROADCASTING CO., INC.; CBS, INC.; FOX TELEVISION STATIONS, INC.; GREATER MEDIA, INC.; INFINITY BROADCASTING CORPORATION; MOTION PICTURE ASSOCIATION OF AMERICA, INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL PUBLIC RADIO; PEOPLE FOR THE AMERICAN WAY; POST-NEWSWEEK STATIONS, INC.; PUBLIC BROADCASTING SERVICE; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF PROFESSIONAL JOURNALISTS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

PACIFICA FOUNDATION; NATIONAL FEDERATION OF COMMUNITY BROADCASTERS; AMERICAN PUBLIC RADIO; NATIONAL ASSOCIATION OF COLLEGE BROADCASTERS; INTERCOLLEGiate BROADCAST SYSTEM; PEN AMERICAN CENTER; ALLEN GINSBERG,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

Petitions for Review of an Order of the
Federal Communications Commission

Decided June 30, 1995

Before EDWARDS, Chief Judge, and WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, Circuit Judges.

Opinion for the court filed by Circuit Judge BUCKLEY, in which Circuit Judges SILBERMAN, STEPHEN F. WILLIAMS, GINSBURG, SENTELLE, KAREN LE-CRAFT HENDERSON, and RANDOLPH concur.

Dissenting opinion filed by Chief Judge HARRY T. EDWARDS.

Dissenting opinion filed by Circuit Judge WALD, in which Circuit Judges ROGERS and TATEL join.

BUCKLEY, Circuit Judge:

We are asked to determine the constitutionality of section 16(a) of the Public Telecommunications Act of 1992, which seeks to shield minors from indecent radio and television programs by restricting the hours within which they may be broadcast. Section 16(a) provides that, with one exception, indecent materials may only be broadcast between the hours of midnight and 6:00 a.m. The exception permits public radio and television stations that go off the air at or before midnight to broadcast such materials after 10:00 p.m.

We find that the Government has a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts. We are also satisfied that, standing alone, the "channeling" of indecent broadcasts to the hours between midnight and 6:00 a.m. would not unduly burden the First Amendment. Because the distinction

drawn by Congress between the two categories of broadcasters bears no apparent relationship to the compelling Government interests that section 16(a) is intended to serve, however, we find the more restrictive limitation unconstitutional. Accordingly, we grant the petitions for review and remand the cases to the Federal Communications Commission with instructions to revise its regulations to permit the broadcasting of indecent material between the hours of 10:00 p.m. and 6:00 a.m.

I. BACKGROUND

The Radio Act of 1927 provides that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both.” 18 U.S.C. § 1464 (1988). While all obscene speech is indecent, not all indecent speech is obscene. The Supreme Court has defined obscene material as

works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973). In enforcing section 1464 of the Radio Act, the Federal Communications Commission defines “broadcast indecency” as

language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.

In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704, 705 n. 10 (1993) (“1993 Report and Order”). This definition has remained substantially unchanged since it was first enunciated in *In re Pacifica Foundation*, 56 F.C.C.2d 94, 98 (1975).

While obscene speech is not accorded constitutional protection, "[s]exual expression which is indecent but not obscene is protected by the First Amendment. . . ." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989). "The Government may, however, regulate the content of [such] constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Id.* Noting that broadcasting has received the most limited First Amendment protection because of its unique pervasiveness and accessibility to children, the Supreme Court has held that the FCC may, in appropriate circumstances, place restrictions on the broadcast of indecent speech. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 750-51, 98 S.Ct. 3026, 3041, 57 L.Ed.2d 1073 (1978) ("when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.").

In *In re Infinity Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930 (1987) ("Reconsideration Order"), the Commission reviewed its decisions in three cases: *In re Infinity Broadcasting Corp. of Pa.*, 2 F.C.C.R. 2705 (1987), *In re Pacifica Foundation, Inc.*, 2 F.C.C.R. 2698 (1987), and *In re Regents of the University of California*, 2 F.C.C.R. 2703 (1987). One of these cases involved a morning broadcast; the other two dealt with programs that were aired after 10:00 p.m. In each of them, the agency found that a radio station had introduced particularly offensive pigs into American parlors in violation of section 1464. The offending morning broadcast, for example, contained "explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles." *Reconsideration Order*, 3 F.C.C.R. at 932 (internal quotation marks omitted). The remaining two were similarly objectionable. *See id.* at 932-33.

The FCC reaffirmed the Government interest in safeguarding children from exposure to such speech and placed broadcasters on notice that because

at least with respect to the particular markets involved, available evidence suggested there were still significant numbers of children in the audience at 10:00 p.m. . . . broadcasters should no longer assume that 10:00 p.m. is automatically the time after which indecent broadcasts may safely be aired. Rather, . . . indecent material would be actionable (that is, would be held in violation of 18 U.S.C. § 1464) if broadcast when there is a reasonable risk that children may be in the audience. . . .

Id. at 930-31. The Commission noted, however, that it was its "current thinking" that midnight marked the time after which

it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience.

Id. at 937 n. 47.

In our review of the *Reconsideration Order in Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir.1988) ("ACT I"), we rejected the argument that the Commission's definition of indecency was unconstitutionally vague and overbroad. *Id.* at 1338-40. But, although we affirmed the declaratory ruling that found portions of the morning broadcast to be in violation of section 1464, *id.* at 1341, we vacated the Commission's rulings with respect to the two post-10:00 p.m. broadcasts. *Id.* In those instances, we considered the findings on which the Commission rested its decision to be "more ritual than real," *id.*, because the Commission had relied on data as to the number of teenagers in the total radio audience rather than the number of them who listened to

the radio stations in question. We were also troubled by the FCC's failure to explain why it identified the relevant age group as children aged 12 to 17 when it had earlier proposed legislation for the protection of only those under 12. *Id.* at 1341-42. We further concluded that "the FCC's midnight advice, indeed its entire position on channeling, was not adequately thought through." *Id.* at 1342.

Two months after our decision in *ACT I*, Congress instructed the Commission to promulgate regulations "enforc[ing] the provisions of . . . section [1464] on a 24 hour per day basis." Pub.L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988). The Commission complied by issuing a regulation banning all broadcasts of indecent material, which was immediately challenged by Action for Children's Television and others. The following year, we remanded the record to the Commission to enable it to solicit information relevant to the congressionally mandated 24-hour ban; and in 1989, the FCC issued a "Notice of Inquiry" for that purpose. *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 F.C.C.R. 8358 (1989) ("1989 NOI").

After analyzing the public comment received in response to the 1989 NOI, the Commission reported its conclusions in *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 F.C.C.R. 5297 (1990) ("1990 Report"). In the 1990 Report, the FCC defined the category of persons to be protected under section 1464 as "children ages 17 and under." *Id.* at 5301. It then found that because

the narrowness with which courts have interpreted "obscenity" has commensurably broadened the range of patently offensive material that could be deemed "indecent" if broadcast . . . [and in light of the evidence] that there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of day and

night[,] . . . the compelling government interest in protecting children from indecent broadcasts would not be promoted effectively by any means more narrowly tailored than a 24-hour prohibition.

Id. at 5297.

We reviewed the 24-hour ban in *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C.Cir.1991) ("*ACT II*"). We again rejected petitioners' vagueness and overbreadth arguments, but we struck down the total ban on indecent broadcasts because "[o]ur previous holding in *ACT I* that the Commission must identify some reasonable period of time during which indecent material may be broadcast necessarily means that the Commission may not ban such broadcasts entirely." *Id.* at 1509.

Shortly after the Supreme Court denied certiorari in *ACT II*, 503 U.S. 913, 112 S.Ct. 1281, 117 L.Ed.2d 507 (1992), Congress again intervened, passing the Public Telecommunications Act of 1992, Pub.L. No. 102-356, 106 Stat. 949 (1992). Section 16(a) of the Act requires the Commission to

promulgate regulations to prohibit the broadcasting of indecent programming—

(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and

(2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

47 U.S.C. § 303 note (Supp. IV 1992). Pursuant to this congressional mandate, the Commission published a notice of proposed rulemaking, *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 7 F.C.C.R. 6464 (1992), and, in 1993, it issued regulations implementing section 16(a). *1993 Report and Order*, 8 F.C.C.R. at 711; 47 C.F.R. § 73.3999 (1994). These are challenged in the petition now before us.

II. DISCUSSION

Petitioners present three challenges to the constitutionality of section 16(a) and its implementing regulations: First, the statute and regulations violate the First Amendment because they impose restrictions on indecent broadcasts that are not narrowly tailored to further the Government's interest, which petitioners define as the promotion of parental authority by shielding unsupervised children from indecent speech in the broadcast media; second, section 16(a) unconstitutionally discriminates among categories of broadcasters by distinguishing the times during which certain public and commercial broadcasters may air indecent material; and third, the Commission's generic definition of indecency is unconstitutionally vague. Petitioners also assert that our decisions in *ACT I* and *ACT II* compel the rejection of the newly enacted restrictions both because there are insufficient data to justify the new statutory ban and because the Commission continues to include children ages 12 to 17 in the protected class.

The Commission argues that the Government's interests extend beyond facilitating parental supervision to include protecting children from exposure to indecent broadcasts and safeguarding the home from unwanted intrusion by such broadcasts. The Commission asserts that restricting indecent broadcasts to the hours between midnight and 6:00 a.m. is narrowly tailored to achieve these compelling governmental interests. It defends the exception allowing public stations that go off the air at or before midnight to broadcast such materials after 10:00 p.m. on the basis that these stations would otherwise have no opportunity to air indecent programs.

At the outset, we dismiss petitioners' vagueness challenge as meritless. The FCC's definition of indecency in the new regulations is identical to the one at issue in *ACT II*, where we stated that "the Supreme Court's decision in *Pacifica* dispelled any vagueness concerns attending

the [Commission's] definition," as did our holding in *ACT I.* 932 F.2d at 1508. Petitioners fail to provide any convincing reasons why we should ignore this precedent.

We now proceed to petitioners' remaining constitutional arguments.

A. The First Amendment Challenge

It is common ground that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable*, 492 U.S. at 126, 109 S.Ct. at 2836. The Government may, however,

regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.

Id. Thus, a restriction on indecent speech will survive First Amendment scrutiny if the "Government's ends are compelling [and its] means [are] carefully tailored to achieve those ends." *Id.*

The Supreme Court has "long recognized that each medium of expression presents special First Amendment problems. . . . [O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748, 98 S.Ct. at 3039-40. (citation omitted). The Court has identified two reasons for this distinction that are relevant here:

First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.

. . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. . . .

Second, broadcasting is uniquely accessible to children. . . . Other forms of offensive expression may be withheld from the young without restricting the expression of its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. . . . The ease with which children may obtain access to broadcast material, coupled with the concerns [over the well-being of youths] recognized in *Ginsberg* [v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968)], amply justifies specific treatment of indecent broadcasting.

Id. at 748-50, 98 S.Ct. at 3040-41. As Justice Powell observed in *Pacifica*,

[t]he difficulty is that . . . a physical separation of the audience [such as that possible in bookstores and movie theaters] cannot be accomplished in the broadcast media. . . . This . . . is one of the distinctions between the broadcast and other media . . . [that] justif[ies] a different treatment of the broadcast media for First Amendment purposes.

438 U.S. at 758-59, 98 S.Ct. at 3045 (Powell, J., concurring in part and concurring in the judgment). Despite the increasing availability of other means of receiving television, such as cable (which is not immune to the concerns we address today, *see Alliance for Community Media v. FCC*, 56 F.3d 105, 123-125 (D.C.Cir.1995)), there can be no doubt that the traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment.

Unlike cable subscribers, who are offered such options as "pay-per-view" channels, broadcast audiences have no

choice but to "subscribe" to the entire output of traditional broadcasters. Thus they are confronted without warning with offensive material. *See Pacifica*, 438 U.S. at 748-49, 98 S.Ct. at 3039-40. This is "manifestly different from a situation" where a recipient "seeks and is willing to pay for the communication. . ." *Sable*, 492 U.S. at 128, 109 S.Ct. at 2837; *see also Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir.1985) (distinguishing *Pacifica* from cases in which cable subscriber affirmatively elects to have specific cable service come into home).

In light of these differences, radio and television broadcasts may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment. While we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment of whether section 16(a) survives that scrutiny must necessarily take into account the unique context of the broadcast medium.

1. *The compelling Government interests*

In examining the Government's interests in protecting children from broadcast indecency, it is important to understand that hard-core pornography may be deemed indecent rather than obscene if it is "not patently offensive" under the relevant contemporary community standards. The Second Circuit, for example, has found that the "detailed portrayals of genitalia, sexual intercourse, fellatio, and masturbation" contained in a grab bag of pornographic materials (which included such notorious films as "Deep Throat") are not obscene in light of the community standards prevailing in New York City. *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132, 134, 137 (2d Cir.1983). Therefore, as Justice Scalia has observed,

[t]he more narrow the understanding of what is "obscene," and hence the more pornographic what is embraced within the residual category of "inde-

cency," the more reasonable it becomes to insist upon greater assurance of insulation from minors.

Sable, 492 U.S. at 132, 109 S.Ct. at 2840 (Scalia, J., concurring).

The Commission identifies three compelling Government interests as justifying the regulation of broadcast indecency: support for parental supervision of children, a concern for children's well-being, and the protection of the home against intrusion by offensive broadcasts. Because we find the first two sufficient to support such regulation, we will not address the third.

Petitioners do not contest that the Government has a compelling interest in supporting parental supervision of what children see and hear on the public airwaves. Indeed, the Court has repeatedly emphasized the Government's fundamental interest in helping parents exercise their "primary responsibility for [their] children's well-being" with "laws designed to aid [in the] discharge of that responsibility." *Ginsberg v. New York*, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968). This interest includes "supporting parents' claim to authority in their own household" through "regulation of otherwise protected expression." *Pacifica*, 438 U.S. at 749, 98 S.Ct. at 3040 (internal quotation marks omitted).

Although petitioners disagree, we believe the Government's own interest in the well-being of minors provides an independent justification for the regulation of broadcast indecency. The Supreme Court has described that interest as follows:

It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical

and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.

New York v. Ferber, 458 U.S. 747, 756-57, 102 S.Ct. 3348, 3354, 73 L.Ed.2d 1113 (1982) (internal quotation marks and citations omitted); *see also Prince v. Massachusetts*, 321 U.S. 158, 165, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944) ("It is [in] the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens.").

While conceding that the Government has an interest in the well-being of children, petitioners argue that because "no causal nexus has been established between broadcast indecency and any physical or psychological harm to minors," Joint Brief for Petitioners at 32, that interest is "too insubstantial to justify suppressing indecent material at times when parents are available to supervise their children." *Id.* at 33. That statement begs two questions: The first is how effective parental supervision can actually be expected to be even when parent and child are under the same roof; the second, whether the Government's interest in the well-being of our youth is limited to protecting them from clinically measurable injury.

As Action for Children's Television argued in an earlier FCC proceeding, "parents, no matter how attentive, sincere or knowledgeable, are not in a position to really exercise effective control" over what their children see on television. *In re Action for Children's Television*, 50 F.C.C.2d 17, 26 (1974). This observation finds confirmation from a recent poll conducted by Fairbank, Maslin, Maullin & Associates on behalf of Children Now. The survey found that 54 percent of the 750 children questioned had a television set in their own rooms and that 55 percent of them usually watched television alone or with friends, but not with their families. Sixty-six percent of them lived in a household with three or more

television sets. Compare 1989 NOI, 4 F.C.C.R. at 8361 (63 percent of households own more than one television and 50 percent of teenagers have a television in own bedrooms). Studies described by the FCC in its 1989 Notice of Inquiry suggest that parents are able to exercise even less effective supervision over the radio programs to which their children listen. According to these studies, each American household had, on average, over five radios, and up to 80 percent of children had radios in their own bedrooms, depending on the locality studied, *id.*; two-thirds of all children ages 6 to 12 owned their own radios, more than half of whom owned headphone radios. *Id.* at 8363. It would appear that Action for Children's Television had a firmer grasp of the limits of parental supervision 20 years ago than it does today.

With respect to the second question begged by petitioners, the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech. In *Ginsberg*, the Court considered a New York State statute forbidding the sale to minors under the age of 17 of literature displaying nudity even where such literature was "not obscene for adults. . . ." 390 U.S. at 634, 88 S.Ct. at 1278. The Court observed that while it was "very doubtful" that the legislative finding that such literature impaired "the ethical and moral development of our youth" was based on "accepted scientific fact," a causal link between them "had not been disproved either." *Id.* at 641-42, 88 S.Ct. at 1281-82. The Court then stated that it "d[id] not demand of legislatures scientifically certain criteria of legislation. We therefore cannot say that [the statute] . . . has no rational relation to the objective of safeguarding such minors from harm." *Id.* at 642-43, 88 S.Ct. at 1282 (internal quotation marks and citations omitted).

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684, 106 S.Ct. 3159, 3164-65, 92 L.Ed.2d 549 (1986), the Court did not insist on a scientific demonstration of psychic injury when it found that there was a compelling governmental interest in protecting high school students from an indecent speech at a high school assembly. It noted that its prior cases "recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Id.* In *Bethel School District* and *Ginsberg*, of course, the protection of children did not require simultaneous restraints on the access of adults to indecent speech. The Court, however, has made it abundantly clear that the Government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting. *Pacifica*, 438 U.S. at 749-50, 98 S.Ct. at 3040-41 ("The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting."); *see also Sable*, 492 U.S. at 131, 109 S.Ct. at 2839 ("compelling interest [in] preventing minors from being exposed to indecent telephone messages").

Finally, we think it significant that the Supreme Court has recognized that the Government's interest in protecting children extends beyond shielding them from physical and psychological harm. The statute that the Court found constitutional in *Ginsberg* sought to protect children from exposure to materials that would "impair[] [their] ethical and moral development." 390 U.S. at 641, 88 S.Ct. at 1282 (emphasis added). Furthermore, although the Court doubted that this legislative finding "expresse[d] an accepted scientific fact," *id.*, it concluded that the legislature could properly support the judgment of

parents and others, teachers for example, who have [the] primary responsibility for children's well-being

... [by] ... assessing sex-related material harmful to minors according to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.

Id. at 639, 88 S.Ct. at 1280 (internal quotation marks omitted).

The Court noted, in the context of obscenity, that

[i]f we accept the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a . . . legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior . . . The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63, 93 S.Ct. 2628, 2638, 37 L.Ed.2d 446 (1973). Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material just this side of legal obscenity. The Supreme Court has reminded us that society has an interest not only in the health of its youth, but also in its quality. *See Prince*, 321 U.S. at 168, 64 S.Ct. at 443 ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."). As Irving Kristol has observed, it follows "from the proposition that democracy is a form of self-government, . . . that if you want it to be a meritorious polity, you have to care

about what kind of people govern it." Irving Kristol, *On the Democratic Idea in America* 41-42, Harper & Row (1972).

We are not unaware that the vast majority of States impose restrictions on the access of minors to material that is not obscene by adult standards. *See 1989 NOI*, 4 F.C.C.R. at 8368-72. In light of Supreme Court precedent and the social consensus reflected in state laws, we conclude that the Government has an independent and compelling interest in preventing minors from being exposed to indecent broadcasts. *See Sable*, 492 U.S. at 126, 109 S.Ct. at 2836 (Government's compelling interest in well-being of minors extends "to shielding [them] from the influence of literature that is not obscene by adult standards").

Petitioners argue, nevertheless, that the Government's interest in supporting parental supervision of children and its independent interest in shielding them from the influence of indecent broadcasts are in irreconcilable conflict. The basic premise of this argument appears to be that the latter interest potentially undermines the objective of facilitating parental supervision for those parents who wish their children to see or hear indecent material.

The Supreme Court has not followed this reasoning. Rather, it treats the Government interest in supporting parental authority and its "independent interest in the well-being of its youth," *Ginsberg*, 390 U.S. at 640, 88 S.Ct. at 1281, as complementary objectives mutually supporting limitations on children's access to material that is not obscene for adults. *Id.* at 639-40, 88 S.Ct. at 1280-81. And while it is true that the decision in *Ginsberg* "denie[d] to children free access to books . . . to which many parents may wish their children to have uninhibited access," *id.* at 674, 88 S.Ct. at 1298 (Fortas, J., dissenting), as Justice Brennan pointed out in writing for the majority, "the prohibition against sales to minors [did]

not bar parents who so desire[d] from purchasing the [material] for their children." *Id.* at 639, 88 S.Ct. at 1280; *see also Pacifica*, 438 U.S. at 749-50, 98 S.Ct. at 3040-41; *id.* at 769-70, 98 S.Ct. at 3050-51 (Brennan, J., dissenting).

Today, of course, parents who wish to expose their children to the most graphic depictions of sexual acts will have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and the rental or purchase of readily available audio and video cassettes. Thus the goal of supporting "parents' claim to authority in their own household to direct the rearing of their children," *id.*, is fully consistent with the Government's own interest in shielding minors from being exposed to indecent speech by persons other than a parent. Society "may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat." *Pacifica*, 438 U.S. at 758, 98 S.Ct. at 3045 (Powell, J., concurring in part and concurring in the judgment).

The Government's dual interests in assisting parents and protecting minors necessarily extends beyond merely channeling broadcast indecency to those hours when parents can be at home to supervise what their children see and hear. It is fanciful to believe that the vast majority of parents who wish to shield their children from indecent material can effectively do so without meaningful restrictions on the airing of broadcast indecency.

2. *Least restrictive means*

The Government may

regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. . . . [B]ut to withstand constitutional

scrutiny, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.

Sable, 492 U.S. at 126, 109 S.Ct. at 2836-37 (internal quotations marks omitted). Petitioners argue that section 16(a) is not narrowly drawn to further the Government's interest in protecting children from broadcast indecency for two reasons: First, they assert that the class to be protected should be limited to children under the age of 12; and second, they contend that the "safe harbor" is not narrowly tailored because it fails to take proper account of the First Amendment rights of adults and because of the chilling effect of the 6:00 a.m. to midnight ban on the programs aired during the evening "prime time" hours. We address these arguments in turn.

a. *Definition of "children"*

Petitioners concede that it is appropriate to protect young children from exposure to indecent broadcasts. They remind us, however, that in *ACT I* we found it "troubling [that] the FCC ventures no explanation why it takes teens aged 12-17 to be the relevant age group for channeling purposes" in light of the fact that in an earlier legislative proposal, "the Commission would have required broadcasters to minimize the risk of exposing to indecent material children *under age 12*," 852 F.2d at 1341-42 (emphasis in original), and that in *ACT II* we directed the Commission on remand to address the question of the appropriate definition of "children." 932 F.2d at 1510.

Although, in *ACT II*, we made no mention of the fact, in its 1990 Report, the FCC defined "children" to include "children ages 17 and under." 5 F.C.C.R. at 5301. The agency offered three reasons in support of its definition: Other federal statutes designed to protect children from

indecent speech use the same standard (citing 47 U.S.C.A. § 223(b)(3) (Supp. II 1990) (forbidding indecent telephone communications to persons under 18)); most States have laws penalizing persons who disseminate sexually explicit materials to children ages 17 and under; and several Supreme Court decisions have sustained the constitutionality of statutes protecting children ages 17 and under (citing *Sable*, *Ginsberg*, and *Bethel School District.*). *Id.*

We find these reasons persuasive and note, as the Commission did in the *1993 Report and Order* promulgating regulations pursuant to section 16(a), that the sponsor of that section, Senator Byrd, made specific reference to the FCC's finding that "there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of the day or night." 138 Cong.Rec. § 7308 (1992) (statement of Sen. Byrd). In light of Supreme Court precedent and the broad national consensus that children under the age of 18 need to be protected from exposure to sexually explicit materials, the Commission was fully justified in concluding that the Government interest extends to minors of all ages.

b. The midnight to 6:00 a.m. "safe harbor"

Although, for the reasons set forth in Part II. B. below, we will require the Commission to allow the broadcast of indecent material between 10:00 p.m. and 6:00 a.m., we will address the propriety of section 16(a)'s midnight to 6:00 a.m. safe harbor. We do so for two reasons: First, in addressing the "narrowly tailored" issue, the parties have focused their arguments on the evidence offered by the Commission in support of the section's 6:00 a.m. to midnight ban on indecent programming. Second, the principles we bring to bear in our analysis of the midnight to 6:00 a.m. safe harbor apply with equal force to the

more lenient one that the Commission must adopt as a result of today's opinion. Although fewer children will be protected by the expanded safe harbor, that fact will not affect its constitutionality. If the 6:00 a.m. to midnight ban on indecent programming is permissible to protect minors who listen to the radio or view television as late as midnight, the reduction of the ban by two hours will remain narrowly tailored to serve this more modest goal.

In *Pacifica*, the Supreme Court found that it was constitutionally permissible for the Government to place restrictions on the broadcast of indecent speech in order to protect the well-being of our youth. 438 U.S. at 749-51, 98 S.Ct. at 3040-41. We have since acknowledged that such restrictions may take the form of channeling provided "that the Commission . . . identify some reasonable period of time during which indecent material may be broadcast. . . ." *ACT II*, 932 F.2d at 1509. The question, then, is what period will serve the compelling governmental interests without unduly infringing on the adult population's right to see and hear indecent material. We now review the Government's attempt to strike that balance.

The Supreme Court has stated that "a government body seeking to sustain a restriction on . . . speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, ____ U.S. ___, ___, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993); *see also Turner Broadcasting System, Inc. v. FCC*, ____ U.S. ___, ___, 114 S.Ct. 2445, 2470, 129 L.Ed.2d 497 (1994) (same). The data on broadcasting that the FCC has collected reveal that large numbers of children view television or listen to the radio from the early morning until late in the evening, that those numbers decline rapidly as midnight approaches, and that a substantial portion of the adult audience is tuned into television or radio broadcasts af-

ter midnight. We find this information sufficient to support the safe harbor parameters that Congress has drawn.

The data collected by the FCC and republished in the Congressional Record for June 1, 1992, indicate that while 4.3 million, or approximately 21 percent, of "teenagers" (defined as children ages 12 to 17) watch broadcast television between 11:00 and 11:30 p.m., the number drops to 3.1 million (15.2 percent) between 11:30 p.m. and 1:00 a.m. and to less than 1 million (4.8 percent) between 1:45 and 2:00 a.m. 138 Cong.Rec. S7321. Comparable national averages are not available for children under 12, but the figures for particular major cities are instructive. In New York, for example, 6 percent of those aged 2 to 11 watch television between 11:00 and 11:30 p.m. on weekdays while the figures for Washington, D.C., and Los Angeles are 6 percent and 3 percent, respectively. *Id.* at S7322.

Concerning the morning portion of the broadcast restriction, the FCC has produced studies which suggest that significant numbers of children aged 2 through 17 watch television in the early morning hours. In the case of Seattle, one of two medium-sized media markets surveyed, an average of 102,200 minors watched television between the hours of 6:00 a.m. and 8:00 a.m., Monday through Friday; in Salt Lake City, the average was 28,000 for the period from 6:00 a.m. to 10:00 a.m. 1993 Report and Order, 8 F.C.C.R. at 708.

The statistical data on radio audiences also demonstrate that there is a reasonable risk that significant numbers of children would be exposed to indecent radio programs if they were broadcast in the hours immediately before midnight. According to the FCC, there is an average quarter-hour radio audience of 2.4 million teenagers, or 12 percent, between 6:00 a.m. and midnight. *Id.* Just over half that number, 1.4 million teenagers, listen to the radio during the quarter hour between midnight and

12:15 a.m. on an average night. *1990 Report*, 5 F.C.C.R. at 5302.

It is apparent, then, that of the approximately 20.2 million teenagers and 36.3 million children under 12 in the United States, *see 1989 NOI*, 4 F.C.C.R. at 8366; n. 33; *Nielsen Television Index National TV Ratings February 24-March 1, 1992* 127, a significant percentage watch broadcast television or listen to radio from as early as 6:00 a.m. to as late as 11:30 p.m.; and in the case of teenagers, even later. We conclude that there is a reasonable risk that large numbers of children would be exposed to any indecent material broadcast between 6:00 a.m. and midnight.

Petitioners suggest that Congress should have used station-specific and program-specific data in assessing when children are at risk of being exposed to broadcast indecency. We question whether this would have aided the analysis. Children will not likely record, in a Nielsen diary or other survey, that they listen to or view programs of which their parents disapprove. Furthermore, changes in the program menu make yesterday's findings irrelevant today. Finally, to borrow the Commission's phrase, such station- and program-specific data do not take "children's grazing" into account. As the Supreme Court observed in *Pacifica*, "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." 438 U.S. at 748, 98 S.Ct. at 3040. (In *Pacifica*, the objectionable broadcast was heard by a child in a car that was being driven by his father.) For this reason, we agree with the Commission that such data would not be "instructive." *1993 Report and Order*, 8 F.C.C.R. at 711.

The remaining question, then, is whether Congress, in enacting section 16(a), and the Commission, in promulgating the regulations, have taken into account the First Amendment rights of the very large numbers of adults who wish to view or listen to indecent broadcasts. We

believe they have. The data indicate that significant numbers of adults view or listen to programs broadcast after midnight. Based on information provided by Nielsen indicating that television sets in 23 percent of American homes are in use at 1:00 a.m., the Commission calculated that between 21 and 53 million viewers were watching television at that time. *1989 NOI*, 4 F.C.C.R. at 8362; *see also id.* at 8381, 8393 (in Chicago, approximately 15 percent of adults watch broadcast television at midnight, and approximately 18 percent do so in Washington, D.C.). Comments submitted to the FCC by petitioners indicate that approximately 11.7 million adults listen to the radio between 10:00 p.m. and 11:00 p.m., while 7.4 million do so between midnight and 1:00 a.m. 1992 Comments at 8 n. 3 (reprinted in Joint Appendix at 348). With an estimated 181 million adult listeners, this would indicate that approximately 6 percent of adults listen to the radio between 10:00 p.m. and 11:00 p.m. while 4 percent of them do so between midnight and 1:00 a.m. *Id.*

While the numbers of adults watching television and listening to radio after midnight are admittedly small, they are not insignificant. Furthermore, as we have noted above, adults have alternative means of satisfying their interest in indecent material at other hours in ways that pose no risk to minors. We therefore believe that a midnight to 6:00 a.m. safe harbor takes adequate account of adults' First Amendment rights.

Petitioners argue, nevertheless, that delaying the safe harbor until midnight will have a chilling effect on the airing of programs during the evening "prime time" hours that are of special interest to adults. They cite, as examples, news and documentary programs and dramas that deal with such sensitive contemporary problems as sexual harassment and the AIDS epidemic and assert that a broadcaster might choose to refrain from presenting relevant material rather than risk the consequences of being

charged with airing broadcast indecency. Whatever chilling effects may be said to inhere in the regulation of indecent speech, these have existed ever since the Supreme Court first upheld the FCC's enforcement of section 1464 of the Radio Act. The enactment of section 16(a) does not add to such anxieties; to the contrary, the purpose of channeling, which we mandated in *ACT I* and reaffirmed in *ACT II*, 852 F.2d at 1343-44; 932 F.2d at 1509, and which Congress has now codified, is to provide a period in which radio and television stations may let down their hair without worrying whether they have stepped over any line other than that which separates protected speech from obscenity. Thus, section 16(a) has ameliorated rather than aggravated whatever chilling effect may be inherent in section 1464.

Petitioners also argue that section 16(a)'s midnight to 6:00 a.m. channeling provision is not narrowly tailored because, for example, Congress has failed to take into consideration the fact that it bans indecent broadcasts during school hours when children are presumably subject to strict adult supervision, thereby depriving adults from listening to such broadcasts during daytime hours when the risk of harm to minors is slight. The Government's concerns, of course, extend to children who are too young to attend school. *See Pacifica*, 438 U.S. at 749, 98 S.Ct. at 3040 ("broadcasting is uniquely accessible to children, even those too young to read"). But more to the point, even if such fine tuning were feasible, we do not believe that the First Amendment requires that degree of precision.

In this case, determining the parameters of a safe harbour involves a balancing of irreconcilable interests. It is, of course, the ultimate prerogative of the judiciary to determine whether an act of Congress is consistent with the Constitution. Nevertheless, we believe that deciding where along the bell curves of declining adult and child audiences it is most reasonable to permit indecent broadcasts is the kind of judgment that is better left to Congress, so

long as there is evidence to support the legislative judgment. Extending the safe harbor for broadcast indecency to an earlier hour involves "a difference only in degree, not a less restrictive alternative in kind." *Burson v. Freeman*, 504 U.S. 191, 210, 112 S.Ct. 1846, 1857, 119 L.Ed.2d 5 (1992) (reducing campaign-free boundary around entrances to polling places from 100 feet to 25 feet is a difference in degree, not a less restrictive alternative in kind); *see also Buckley v. Valeo*, 424 U.S. 1, 30, 96 S.Ct. 612, 640, 46 L.Ed.2d 659 (1976) (if some limit on campaign contributions is necessary, court has no scalpel to probe whether \$2,000 ceiling might not serve as well as \$1,000). It follows, then, that in a case of this kind, which involves restrictions in degree, there may be a range of safe harbors, each of which will satisfy the "narrowly tailored" requirement of the First Amendment. We are dealing with questions of judgment; and here, we defer to Congress's determination of where to draw the line just as the Supreme Court did when it accepted Congress's judgment that \$1,000 rather than some other figure was the appropriate limit to place on campaign contributions.

Recognizing the Government's compelling interest in protecting children from indecent broadcasts, Congress channeled indecent broadcasts to the hours between midnight and 6:00 a.m. in the hope of minimizing children's exposure to such material. Given the substantially smaller number of children in the audience after midnight, we find that section 16(a) reduces children's exposure to broadcast indecency to a significant degree. We also find that this restriction does not unnecessarily interfere with the ability of adults to watch or listen to such materials both because substantial numbers of them are active after midnight and because adults have so many alternative ways of satisfying their tastes at other times. Although the restrictions burden the rights of many adults, it seems entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of

the young. We thus conclude that, standing alone, the midnight to 6:00 a.m. safe harbor is narrowly tailored to serve the Government's compelling interest in the well-being of our youth.

B. The Public Broadcaster Exception

Section 16(a) permits public stations that sign off the air at or before midnight to broadcast indecent material after 10:00 p.m. See 47 U.S.C. § 303 note. Petitioners argue that section 16(a) is unconstitutional because it allows the stations to present indecent material two hours earlier than all others.

Congress has provided no explanation for the special treatment accorded these stations other than the following: "In order to accommodate public television and radio stations that go off the air at or before 12 midnight, the FCC's enforcement authority would extend [to] the hour of 10 o'clock p.m. for those stations." 138 Cong.Rec. S7308 (statement of Sen. Bryd). The Commission has done little better. In its *1993 Report and Order*, the agency explained the preference as follows:

In balancing the interests at stake, it appears reasonable to afford public broadcasters that do not operate during the regular safe harbor time period at least some opportunity to air indecent material as opposed to forcing them to extend their broadcast day beyond that which is economically feasible. Congress carved out this exception apparently as a kind of "rough accommodation" of its concerns for public broadcasters.

8 F.C.C.R. at 710. In its brief, the Commission justifies the disparate treatment accorded public and commercial broadcasters who sign off the air at midnight by suggesting that the latter may be able to finance the extension of their broadcasting day through the sale of advertising time. The agency also argues that allowing these public stations to begin broadcasting indecent material at 10:00

p.m. despite the significantly larger number of children in the radio and television audiences represents a reasonable trade-off because it serves the "substantial" (as opposed to "compelling") governmental interest in accommodating the free speech rights of those stations. The Commission does not address the phenomenon of "children's grazing" that it used so effectively in arguing against the relevance of program-specific statistics.

Because Congress has made no suggestion that minors are less likely to be corrupted by sexually explicit material that is broadcast by a public as opposed to a commercial station, and because section 16(a) was adopted in reluctant response to our rejection of the earlier statute imposing a total ban on indecent broadcasts, we can only conclude that Congress created the exception as a result of a misunderstanding of our directive in *ACT II*. Our instruction that the Commission must "afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired," 932 F.2d at 1509 (internal quotation marks omitted), did not require that every station be given some opportunity to broadcast indecent material. Rather, it was our expressed view that a clearly articulated channeling rule, as opposed to a case-by-case approach, was necessary to enable broadcasters to know when they might safely air indecent material. As the Supreme Court has observed, in this unique medium, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969).

Whatever Congress's reasons for creating it, the preferential safe harbor has the effect of undermining both the argument for prohibiting the broadcasting of indecent speech before that hour and the constitutional viability of the more restrictive safe harbor that appears to have been Congress's principal objective in enacting section 16(a). In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S.

221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the Supreme Court addressed a state sales tax that provided a tax exemption for religious, professional, trade, and sports journals, but not other magazines. The Court invalidated the selective application of the sales tax, in part because the articulated interest of encouraging "fledgling" publishers did not apply to struggling magazines other than those specified. *Id.* at 232, 107 S.Ct. at 1729. The Court found that even assuming there was a compelling interest in protecting such publishers, a selective exemption is not narrowly tailored to achieve that end. *Id.*; accord *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 591-92, 103 S.Ct. 1365, 1375-76, 75 L.Ed.2d 295 (1983) (state tax that exempted first \$100,000 worth of ink and paper from state use tax unconstitutionally discriminated against small group of larger newspapers in violation of First Amendment).

Similarly, in *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), a municipal ordinance imposed a ban on newsracks dispensing commercial publications because they were unsightly but did not impose this ban on newsracks dispensing newspapers. The Court struck down the regulation, finding that the distinction between commercial and noncommercial newsracks bore "no relationship whatsoever to the particular interests that the city has asserted. It [was] therefore an impermissible means of responding to the city's admittedly legitimate interests." *Id.* at ——, 113 S.Ct. at 1514 (emphasis in original).

Congress has failed to explain what, if any, relationship the disparate treatment accorded certain public stations bears to the compelling Government interest—or to any other legislative value—that Congress sought to advance when it enacted section 16(a). This is not a case like *Alliance for Community Media*, 56 F.3d at 127-28, in which we allowed the FCC to require the segregation and

blocking of indecent programs on leased-access channels while not imposing a similar restriction on public access channels. There, the Commission was able to justify the disparate treatment by carefully documenting the relationship between the regulation at issue and the problem to be solved, namely, the uninvited intrusion of indecent material into leased-access channel programming. Here, Congress and the Commission have backed away from the consequences of their own reasoning, leaving us with no choice but to hold that the section is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight.

C. Our Decisions in *ACT I* and *ACT II*

Petitioners maintain that our holdings in *ACT I* and *ACT II* preclude our findings that section 16(a) is narrowly tailored to achieve the Government's compelling interest as defined by them. While we have addressed their principal arguments above—and have done so in a manner that we believe to be consistent with our holdings in those two cases—we point to certain essential differences between this case and those with which we dealt in *ACT I* and *ACT II*.

ACT I involved an assessment of the constitutionality of channeling decisions that had been made by the FCC on its own initiative; here we are dealing with an act of Congress which, as the Supreme Court has pointed out, enjoys a "presumption of constitutionality" that is not to be equated with "the presumption of regularity afforded an agency in fulfilling its statutory mandate." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9, 103 S.Ct. 2856, 2866 n. 9, 77 L.Ed.2d 443 (1983). It is true, of course, that in *ACT II* we vacated a total ban on indecent broadcasts that Congress had attached to an appropriations bill. In doing so, we stated that our holding in *ACT I*

necessarily means that the Commission may not ban such broadcasts entirely. The fact that Congress itself mandated the total ban on broadcast indecency does not alter our view that, under *ACT I*, such a prohibition cannot withstand constitutional scrutiny.

932 F.2d at 1509. Having declared Congress's 24-hour ban unconstitutional because of its totality, we remanded the case to the Commission with instructions to redetermine,

after a full and fair hearing, the times at which indecent material may be broadcast, to carefully review and address the specific concerns we raised in *ACT I*: among them, the appropriate definitions of "children" and "reasonable risk" for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts.

Id. at 1510 (internal quotation marks and ellipsis omitted). In doing so, we made no mention of the fact that subsequent to our decision in *ACT I*, the Commission had accumulated substantial information and comments relating to the banning of indecent broadcasts and had stated its reasons for defining "children" to include those aged 12 to 17. *ACT II*, therefore, cannot be seen as a rejection of the sufficiency of either.

While our holdings in this case are generally consistent with those in our two earlier decisions, we acknowledge that there are significant differences in our approach to certain of the issues. To the degree that the analyses in those earlier cases disagree with that contained in today's decision, they are, of course, superseded.

III. CONCLUSION

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 2545, 105 L.Ed.2d 342 (1989). The Constitution, however, permits restrictions on speech where necessary in order to serve a compelling public interest, provided that they are narrowly tailored. We hold that section 16(a) serves such an interest. But because Congress imposed different restrictions on each of two categories of broadcasters while failing to explain how this disparate treatment advanced its goal of protecting young minds from the corrupting influences of indecent speech, we must set aside the more restrictive one. Accordingly, we remand this case to the Federal Communications Commission with instructions to limit its ban on the broadcasting of indecent programs to the period from 6:00 a.m. to 10:00 p.m.

It is so ordered.

HARRY T. EDWARDS, Chief Judge, dissenting:

In this case, the majority upholds as constitutional a *total ban* of "indecent" speech on *broadcast* television and radio between the hours of 6 a.m. and midnight.¹ The

¹ At issue is the Public Telecommunications Act of 1992, Pub.L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992) ("section 16(a)"). Section 16(a) of Act provides:

FCC Regulations—The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—

- (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
- (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

The regulations required under this subsection shall be promulgated in accordance with section 553 of title 5, United States Code, and shall become final not later than 180 days after the date of enactment of this Act [Aug. 26, 1992].

47 U.S.C. § 303 note (Supp. IV 1992).

Section 16(a) was enforced by the Federal Communications Commission in 1993. *In the Matter of Enforcement Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1484: Report and Order*, 8 F.C.C.R. 704, 711 (1993) ("Enforcement Order").

Although the majority finds the 6 a.m. to midnight ban is narrowly tailored to serve a compelling state interest, it holds that section 16(a) is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10 p.m. and midnight. The majority reaches this conclusion because "Congress has failed to explain what, if any, relationship the disparate treatment accorded certain public stations bears to the compelling Government interest—or to any legislative value—that Congress sought to advance when it enacted section 16(a)."

The "public broadcaster exception" is an aside to the real issue in this case. Indeed, in holding that the 6 a.m. to midnight ban is constitutional, the majority appears to invite Congress to extend the 6 a.m. to midnight ban to all broadcasters, without exception. Therefore, in my view, the majority's treatment of this issue in no way deflects from its principal holding that "the midnight to

majority readily acknowledges that *indecent* speech (as distinguished from *obscene* speech) is fully protected by the Constitution, and that the Government may not regulate such speech based on its content except when it chooses the least restrictive means to effectively promote an articulated compelling interest. In this case, the Government fails to satisfy the acknowledged constitutional strictures.

The Government advances three goals in support of the statute: first, it claims that the statute facilitates parental supervision of the programming their children watch and hear; second, it claims that the ban promotes the well-being of minors by protecting them from indecent programming assumed to be harmful; and, finally, it contends that the ban preserves the privacy of the home. *Enforcement Order*, 8 F.C.C.R. at 705-06. The majority finds the first two interests compelling, and so finds it unnecessary to address the third. I, too, will focus on the first two interests, which I find to be unsupported.

As an initial matter, I do not comprehend how the two interests can stand *together*. "Congress may properly pass a law to facilitate *parental supervision of their children*, i.e., a law that simply segregates and blocks indecent programming and thereby helps parents control whether and to what extent their children are exposed to such programming. However, a law that effectively *bans* all indecent programming—as does the statute at issue in this case—does not facilitate parental supervision. In my view, my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my . . . television. Congress cannot take away my right to decide what my children watch, absent some showing that my children are in fact at risk of harm from

6:00 a.m. safe harbor is narrowly tailored to serve the Government's compelling interest in the well-being of our youth." It is this holding that will be the focus of this dissent.

exposure to indecent programming." *Alliance for Community Media v. FCC*, 56 F.3d 105, 145 (D.C.Cir. 1995) (Edwards, C.J., dissenting).

Furthermore, the two interests—facilitating parental supervision and protecting children from indecent material—fare no better if considered alone. With respect to the alleged interest in protecting children, although the majority strains mightily to rest its finding of harm on intuitive notions of morality and decency (notions with which I have great sympathy), the simple truth is that "[t]here is not one iota of evidence in the record . . . to support the claim that exposure to indecency is harmful—indeed, the nature of the alleged 'harm' is never explained." *Id.* There is significant evidence suggesting a causal connection between viewing *violence* on television and antisocial violent behavior;² but, as was conceded by Government counsel at oral argument in this case, the FCC has pointed to no such evidence addressing the effects of *indecent* programming. With respect to the interest in facilitating parental supervision, the statute is not tailored to aid parents' control over what their children watch and hear; it does not, for example, "segregate" indecent programming on special channels, as was the case in *Alliance for Community Media*,³ nor does it pro-

² See, e.g., ALBERT BANDURA, AGGRESSION: A SOCIAL LEARNING ANALYSIS 72-76 (1973); WILLIAM A. BELSON, TELEVISION VIOLENCE AND THE ADOLESCENT BOY (1978); GEORGE COMSTOCK, THE EVOLUTION OF AMERICAN TELEVISION 159-238 (1989); MONROE M. LEFKOWITZ ET AL., GROWING UP TO BE VIOLENT: A LONGITUDINAL STUDY OF THE DEVELOPMENT OF AGGRESSION (1977); L. Rowell Huesmann et al., *The Effects of Television Violence on Aggression: A Reply to a Skeptic*, in PSYCHOLOGY AND SOCIAL POLICY 191 (Peter Suedfeld & Philip E. Tetlock eds., 1992); David Pearl, *Familial, Peer, and Television Influence on Aggressive and Violent Behavior*, in CHILDHOOD AGGRESSION AND VIOLENCE: SOURCES OF INFLUENCE, PREVENTION, AND CONTROL 231, 236-37 (David H. Crowell et al. eds., 1987).

³ *Alliance for Community Media* involved the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-

mote a blocking device which individuals control. Rather, section 16(a) involves a *total ban* of disfavored programming during hours when adult viewers are most likely to be in the audience.

Because the statutory ban imposed by section 16(a) is not the least restrictive means to further compelling state interests, the majority decision must rest primarily on a perceived distinction between the First Amendment rights of *broadcast media* and *cable* (*and all other non-broadcast*) *media*. The majority appears to recognize that section 16(a) could not withstand constitutional scrutiny if applied against *cable* television operators; nonetheless, the majority finds this irrelevant because it believes that "there can be no doubt that the traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment." This is the heart of the case, plain and simple.

Respectfully, I find the majority's position flawed. First, because I believe it is no longer responsible for courts to provide lesser First Amendment protection to broadcasting based on its alleged "unique attributes," I would scrutinize section 16(a) in the same manner that courts scrutinize speech restrictions of cable media.

Second, I find it incomprehensible that the majority can so easily reject the "public broadcaster exception" to section 16(a), *see note 1 supra*, and yet be blind to the utterly irrational distinction that Congress has created between *broadcast* and *cable* operators. No one disputes that cable exhibits more and worse indecency than does broadcast. And cable television is certainly pervasive in our country. Today, a majority of television households

385, § 10, 106 Stat. 1460, 1468 (1992) and *In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 F.C.C.R. 2638 (1993), which included a segregate-and-block scheme.

have cable,⁴ and over the last two decades, the percentage of television households with cable has increased every year.⁵ However, the Government does not even attempt to regulate cable with the same heavy regulatory hand it applies to the broadcast media. There is no ban between 6 a.m. and midnight imposed on cable. Rather, the Government relies on viewer subscription and individual discretion instead of regulation of commercial cable. Viewers may receive commercial cable, with all of its indecent material, to be seen by adults and children at any time, subject only to the viewing discretion of the cable subscriber. "Furthermore, many subscribers purchase cable service to get improved [broadcast] television reception, and a number of basic cable subscriptions are packaged to include channels that offer some indecent programming; so these subscribers will get indecent programming whether they want it or not." *Id.*, 56 F.3d at 149 (Edwards, C.J., dissenting). In other words, the Government assumes that this scheme, which relies on personal subscription and individual discretion, fosters parental choice and protects children without unduly infringing on the free speech rights of cable operators and the adult audience.

⁴ Approximately 59 million households have cable television. RESEARCH & POLICY ANALYSIS DEPARTMENT, NATIONAL CABLE TELEVISION ASSOCIATION, CABLE TELEVISION DEVELOPMENTS: INDUSTRY OVERVIEW, Fall 1994, at 1-A (citing A.C. Nielsen Co. & Paul Kagan Associates, Inc., *Marketing New Media*, June 20, 1994); see also *Alliance for Community Media*, 56 F.3d at 124-25 (citing H.R.CONF.REP. No. 862, 102d Cong., 2d Sess. 56 (1992) (noting that more than sixty percent of all households with television, subscribe to cable)); *id.* (citing S.REP. No. 92, 102d Cong., 2d Sess. 3 (1991) U.S.Code Cong. & Admin.News 1992, pp. 1183, 1185, 1238 (noting that "[c]able television has become our Nation's dominant video distribution medium")).

⁵ In 1975, the percentage of television households with cable was 13%; in 1985, the percentage was 45%; and in 1994, estimation suggest between 62% and 63% of television households have cable. NATIONAL CABLE TELEVISION ASSOCIATION, at 1-A, 2-A.

If exposure to "indecency" really is harmful to children, then one wonders how to explain congressional schemes that impose iron-clad bans of indecency on *broadcasters*, while simultaneously allowing a virtual free hand for the real culprits—*cable operators*. And the greatest irony of all is that the majority holds that section 16(a) is constitutional in part because, in allowing parents to subscribe to cable television as they see fit, Congress has facilitated parental supervision of children. In other words, Congress may ban indecency on broadcast television because parents can easily purchase all the smut they please on cable! I find this rationale perplexing.

At bottom, I dissent for three reasons: First, the Government's asserted interests in facilitating parental supervision and protecting children from indecency are irreconcilably in conflict in this case. Second, the Commission offers no evidence that indecent broadcasting harms children. And although it is an easy assumption to make—that indecent broadcasting is harmful to minors—Supreme Court doctrine suggests that the Government must provide some evidence of harm before enacting speech-restrictive regulations. Finally, the Government has made no attempt to search out the least speech-restrictive means to promote the interests that have been asserted. For these reasons, section 16(a) should be struck down as unconstitutional.

I. FIRST AMENDMENT PROTECTIONS FOR THE BROADCAST MEDIA

Over the years, Congress and the Commission have regulated the broadcast media more heavily than they have regulated the non-broadcast media. And courts have upheld speech-restrictive regulations imposed on broadcast which undoubtedly would have been struck down were they imposed on other media. See, e.g., *Turner Broadcasting Sys., Inc. v. FCC*, ____ U.S. ___, ___, 114 S.Ct. 2445, 2456, 129 L.Ed.2d 497 (1994) ("TBS")

("It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media.")⁶; *FCC v. League of Women Voters of California*, 468 U.S. 364, 376, 104 S.Ct. 3106, 3115, 82 L.Ed.2d 278 (1984) ("Were a similar ban . . . applied to newspapers and magazines, we would not hesitate to strike it down as violative of the First Amendment"). The Supreme Court has explained its tendency to uphold speech-restrictive regulations of broadcast as providing the broadcast media with limited First Amendment protection. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748, 98 S.Ct. 3026, 3040, 57 L.Ed.2d 1073 (1978) (plurality opinion) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").

The absurdity of this bifurcated approach—applying a relaxed level of scrutiny to content-based regulations of broadcast and a strict level of scrutiny for content-based regulations of non-broadcast media—is most apparent in a comparison of the Supreme Court's analysis of broadcast and cable. In *Pacifica*, a plurality of the Court applied a reduced level of scrutiny in determining the First Amendment rights of a broadcasting station. 438 U.S. at 748-50, 98 S.Ct. at 3039-41. Last year, however, a majority of the Court held that cable television is entitled to the same First Amendment protection as all other non-broadcast media. *TBS*, — U.S. at —, 114 S.Ct. at 2456-57. There is no justification for this apparent dichotomy in First Amendment jurisprudence. Whatever

⁶ "Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 871 (1969) (television), and *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943) (radio), with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (print), and *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (personal solicitation)." *TBS*, — U.S. at —, 114 S.Ct. at 2456 (parallel citations omitted).

the merits of *Pacifica* when it was issued almost 20 years ago, it makes no sense now.⁷

The justification for the Supreme Court's distinct First Amendment approach to broadcast originally centered on the notion of spectrum scarcity. The electromagnetic spectrum was physically limited—there were more would-be broadcasters than frequencies available and broadcasters wishing to broadcast on the same frequency may have interfered with each other—and required regulation to assign frequencies to broadcasters. See *TBS*, — U.S.

⁷ In beginning their analysis of content-based regulations of broadcast, Court opinions often cite to the now-familiar quotation from *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503, 72 S.Ct. 777, 781, 96 L.Ed. 1098 (1952): "Each method [of expression] tends to present its own peculiar problems." See, e.g. *Pacifica*, 438 U.S. at 748, 98 S.Ct. at 3039-40; *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 386-87, 89 S.Ct. 1794, 1804-05, 23 L.Ed.2d 371 (1969); *League of Women Voters*, 468 U.S. at 377, 104 S.Ct. at 3106. In fact, these opinions seem to attribute more to the Court's statement in *Joseph Burstyn* than appears warranted. Compare *Joseph Burstyn*, 343 U.S. at 503, 72 S.Ct. at 781 ("Each method tends to present its own peculiar problems.") with *Pacifica*, 438 U.S. at 748, 98 S.Ct. at 3039 ("We have long recognized that each medium of expression presents special First Amendment problems." (citing *Joseph Burstyn*, 343 U.S. at 502-03, 72 S.Ct. at 780-81)) and *Red Lion*, 395 U.S. at 386-87, 89 S.Ct. at 1805 ("[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them." (citing *Joseph Burstyn*, 343 U.S. at 503, 72 S.Ct. at 781)).

More glaringly, these opinions fail to quote the sentence that follows. In *Joseph Burstyn*, the Supreme Court struck down a law which forbade the showing of any motion-picture film without a license, that could be withheld if a censor found the film sacrilegious. In determining that motion pictures were within the protection of the First Amendment, the Court stated: "Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." 343 U.S. at 503, 72 S.Ct. at 781 (emphasis added). Certainly with respect to broadcast and cable, the peculiar problems or differences between the two media do not justify different levels of First Amendment protection.

at —, 114 S.Ct. at 2456. The Court reasoned that the Government could impose limited content restraints and certain affirmative obligations on broadcasters on account of spectrum scarcity. *See id.* at —, 114 S.Ct. at 2457 (citing *Red Lion*, 395 U.S. at 390, 89 S.Ct. at 1806-07). In 1978, the Court provided two additional rationales—broadcast was uniquely intrusive into the privacy of the home and uniquely accessible to children—which justified relaxed scrutiny and thereby reduced the First Amendment protection accorded to broadcasters. *See Pacifica*, 438 U.S. at 748-49, 98 S.Ct. at 3039-40. These justifications—spectrum scarcity, intrusiveness, and accessibility to children—neither distinguish broadcast from cable, nor explain the relaxed application of the principles of the First Amendment to broadcast.

A. Spectrum Scarcity

In 1943, the Court determined that the “unique characteristic” of broadcast—that “[u]nlike other modes of expression, radio inherently is not available to all”—explained “why, unlike other modes of expression, it is subject to governmental regulation.” *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 226, 63 S.Ct. 997, 1014, 87 L.Ed. 1344 (1943) (“NBC”). Twenty Ct. 997, 1014, 87 L.Ed. 1344 (1943) (“NBC”). Twenty-six years later, the Court spun out the First Amendment implications of this burgeoning scarcity theory. *Red Lion*, 395 U.S. at 388-90, 89 S.Ct. at 1805-07. The Court first offered an economic scarcity theory,⁸ finding that “[w]here there are substantially more indi-

⁸ Interestingly, in responding to Government’s argument that cable and broadcast are alike in that they both are beset by “market dysfunction,” the *TBS* Court stated that “the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence.” — U.S. at —, 114 S.Ct. at 2457 (citations omitted). Apparently, the Court is now prepared to abandon the economic scarcity theory.

viduals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."⁹ *Id.* at 388, 89 S.Ct. at 1806. The Court also offered a technological scarcity theory: recognizing the need to prevent "overcrowd[ing] of the spectrum,"¹⁰ *id.* at 389, 89 S.Ct. at 1806, the Court held that, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium,"¹¹ *id.* at 390 89 S.Ct. at 1806.

Although the Supreme Court has not declared the distinction between broadcast and other media a dead one, it has not lately given the distinction an enthusiastic endorsement. In fact, in recent years the Court has only

⁹ The scarcity theory justifying regulation of broadcast was hinged in part on a public trust notion: "those who are granted a license to broadcast must serve in a sense as fiduciaries for the public." *League of Women Voters*, 468 U.S. at 377, 104 S.Ct. at 3116.

¹⁰ The Court recently restated this concern: "if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all." *TBS*, — U.S. at —, 114 S.Ct. at 2456 (citing *NBC*, 319 U.S. at 212, 63 S.Ct. at 1007-08).

¹¹ See also *TBS*, — U.S. at —, 114 S.Ct. at 2457 (noting that spectrum scarcity "has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees" (citing *Red Lion*, 395 U.S. at 390, 89 S.Ct. at 1806-07)); *League of Women Voters*, 468 U.S. at 377, 104 S.Ct. at 3116 ("The fundamental distinguishing characteristics of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that '[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants.' " (quoting *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101, 98 S.Ct. 2080, 2086, 36 L.Ed.2d 772 (1973))).

grudgingly upheld the distinction. *See, e.g., TBS, ____ U.S. at ____*, 114 S.Ct. at 2456-57. On a few occasions, the Supreme Court has acknowledged the mounting criticism against its scarcity rationale. *See id.* at ____, 114 S.Ct. at 2457 (noting, that "courts and commentators have criticized the scarcity rationale since its inception");¹² *League of Women Voters*, 468 U.S. at 376-77 n. 11, 104 S.Ct. at 3115-16 n. 11.¹³ Nevertheless, to date, the Court has declined to revisit the validity of the scarcity rationale. *See TBS, ____ U.S. at ____*, 114 S.Ct. at 2457 ("[W]e have declined to question its continuing validity as support for our broadcast jurisprudence . . . and see no reason to do so here."); *League of Women Voters*, 468 U.S. at 377 n. 11, 104 S.Ct. at 3116 n. 11 ("We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have

¹² In *TBS*, ____ U.S. at ____ n. 5, 114 S.Ct. at 2457 n. 5, the Court cited some of those courts and commentators: *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 508-09 (D.C.Cir.1986), cert. denied, 482 U.S. 919, 107 S.Ct. 3196, 96 L.Ed.2d 684 (1987); LEE BOLLINGER, *IMAGES OF A FREE PRESS* 87-90 (1991); LUCAS POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 197-209 (1987); MATTHEW SPITZER, *SEVEN DIRTY WORDS AND SIX OTHER STORIES* 7-18 (1986); R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 12-27 (1959); Laurence H. Winer, *The Signal Cable Sends—Part I: Why Can't Cable Be More Like Broadcasting?*, 46 M.D.L.REV. 212, 218-40 (1987); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV.L.REV. 1062, 1072-74 (1994).

¹³ The *League of Women Voters* Court noted that "[t]he prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years," and that "[c]ritics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete." 468 U.S. at 376-77 n. 11, 104 S.Ct. at 3115-16 n. 11 (citing Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX.L.REV. 207, 221-26 (1982)).

advanced so far that some revision of the system of broadcast regulation may be required."').¹⁴ In my view, it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast based on an indefensible notion of spectrum scarcity. It is time to revisit this rationale.

For years, scholars have argued that the scarcity of the broadcast spectrum is neither an accurate technological description of the spectrum, nor a "unique characteristic" that should make any difference in terms of First Amendment protection.¹⁵ First, in response to the problem of broadcast interference when multiple broadcasters attempt to transmit on the same frequency, critics point out that this problem does not distinguish broadcasting for print¹⁶ and is easily remedied with a system of administrative licensing or private property rights.¹⁷ Another problem alluded to by the Court in *Red Lion* is the claim that the spectrum is inherently limited, in contrast to cable stations or newsprint. Today, however, the nation

¹⁴ In 1987, the Commission explicitly provided that "signal" to the Supreme Court in holding that, "the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press." *In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York*, 2 F.C.C.R. 5043, 5053 (1987); see also Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L.REV. 990, 1011 (1989).

¹⁵ For a particularly thorough rejection of various scarcity arguments, see Spitzer, *supra*, at 1013-20, and notes 12-14 *supra*.

¹⁶ See Spitzer, *supra*, at 1013-15.

¹⁷ Coase demonstrated that one can efficiently distribute rights to scarce resources through a market system. See Coase, *supra*, at 12-27.

enjoys a proliferation of broadcast stations,¹⁸ and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum.¹⁹

In response to the economic scarcity argument—that there are more would-be broadcasters than spectrum frequencies available—economists argue that all resources are scarce in the sense that people often would like to use more than exists.²⁰ Especially when the Government gives

¹⁸ This court has found that “[b]roadcast frequencies are much less scarce now than when the scarcity rationale first arose in *National Broadcasting Co.* . . . and it appears that currently ‘the number of broadcast stations . . . rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried.’” *Telecommunications Research & Action Ctr.*, 801 F.2d at 508-09 n. 4 (quoting *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C.Cir.), cert. denied, 464 U.S. 1008, 104 S.Ct. 525, 78 L.Ed.2d 709 (1983)). This court went on to note, “[i]ndeed, many markets have a far greater number of broadcasting stations than newspapers.” *Id.*; see also Cass R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 54 (1993) (noting that most cities have far more television and radio stations than major newspapers).

¹⁹ See Spitzer, *supra*, at 1015; cf. Fowler & Brenner, *supra*, at 222-23 (suggesting that additional channels can be added without increasing portion reserved for broadcast by decreasing bandwidth of each channel and claiming that advertising dollars restrict broadcast opportunities more than number of channels).

²⁰ Judge Bork's opinion *Telecommunications Research & Action Ctr.* sums up this point:

It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a uni-

away a valuable commodity, such as the right to use certain airwaves free of charge, the demand will likely always exceed the supply.²¹ And with the development of cable, spectrum-based communications media now have an abundance of alternatives, essentially rendering the economic scarcity argument superfluous.

In short, neither technological nor economic scarcity distinguish broadcast from other media. And while some may argue that spectrum scarcity may justify a system of administrative regulation as opposed to a free market approach to stations,²² the theory does not justify reduced First Amendment protection.

B. Accessibility to Children and Pervasiveness

The two additional rationales offered by the plurality opinion in *Pacifica*, attempting to distinguish broadcasting from other media, also fail to justify limited First Amendment protection of broadcast. The plurality found that "broadcasting is uniquely accessible to children, even those too young to read." *Pacifica*, 438 U.S. at 749, 98 S.Ct. at 3040.²³ This characteristic, however, fails to dis-

versal fact as a distinguishing principle necessarily leads to analytical confusion.

801 F.2d at 508 (footnotes omitted).

²¹ Spitzer suggests that if one were to give paper away for free, the demand would certainly exceed the supply. See Spitzer, *supra*, at 1016.

²² Coase presents a compelling argument for a free market system, in which we would treat broadcast rights as private property to avoid the chaos of the 1920s: after an initial allocation, ownership and use could be governed by the free market. See Coase, *supra*, at 12-27.

²³ In *Joseph Burstyn*, the Court faced a similar argument, "that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression." 343 U.S. at 502, 72 S.Ct. at 780. The Court responded that, "[e]ven if one were to accept this hypothesis, it does not follow that mo-

tinguish broadcast from cable; and, notably, the rationale is absent from the Court's *TBS* opinion.

The plurality in *Pacifica* added another rationale which really has two components. The opinion reasoned that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. . . . [The] material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home."²⁴ *Id.* at 748, 98 S.Ct. at 3040. Again, the pervasiveness of its programming hardly distinguishes broadcast from cable. As noted above, cable is pervasive: a majority of television households have cable today, and this percentage has increased every year over the last two decades. See NATIONAL CABLE TELEVISION ASSOCIATION, *supra*, at 1-A, 2-A. The intrusiveness rationale, that the material confronts the citizen in the privacy of his or her home, likewise, does not distinguish broadcast from cable, nor account for the divergent First Amendment treatment of the two media. Finally, in light of *TBS*, in which the Court omitted any discussion of these rationales, the *Pacifica* rationales no longer can be seen to serve as justifications for reduced First Amendment protection afforded to broadcast.

tion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here." *Id.*

²⁴ The plurality opinion added:

Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.

Pacifica, 438 U.S. at 748-49, 98 S.Ct. at 3040. This elaboration on the intrusiveness rationale, of course, does not distinguish broadcast from cable.

It is relevant that *Pacifica* was a plurality opinion which provided a very limited holding. See 438 U.S. at 750, 98 S.Ct. at 3041 ("It is appropriate . . . to emphasize the narrowness of our holding. . . . The Commission's decision rested entirely on a nuisance rationale under which context is all-important."), The Court has subsequently emphasized that *Pacifica's* holding was "emphatically narrow," *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127, 109 S.Ct. 2829, 2837, 106 L.Ed.2d 93 (1989), essentially confirming that *Pacifica* never was seen to be a seminal statement of constitutional law. But beyond the narrowness of the Court's decision, it seems clear now that *Pacifica* is a flawed decision, at least when one considers it in light of enlightened economic theory, technological advancements, and subsequent case law. The critical underpinnings of the decision are no longer present. Thus, there is no reason to uphold a distinction between broadcast and cable media pursuant to a bifurcated First Amendment analysis.²⁵

II. FULL FIRST AMENDMENT PROTECTION OF BROADCAST

Because no reasonable basis can be found to distinguish broadcast from cable in terms of the First Amendment protection the two media should receive, I would review

²⁵ Zechariah Chafee provides a historical view of the Court's wavering toleration of speech-restrictive regulations on different media:

Newspapers, books, pamphlets, and large meetings were for many centuries the only means of public discussion, so that the need for their protection has long been generally realized. On the other hand, when additional methods for spreading facts and ideas were introduced or greatly improved by modern inventions, writers and judges had not got into the habit of being solicitous about guarding their freedom. And so we have tolerated censorship of the mails, the importation of foreign books, the stage, the motion picture, and the radio.

ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 381 (1942).

section 16(a) and the *Enforcement Order* under the stricter level of scrutiny courts apply to content-based regulations of cable. This means "the most exacting scrutiny" should be applied "to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *TBS*, ____ U.S. at ____, 114 S.Ct. at 2459.²⁶ In *Sable*, the Court indicated that the "exact scrutiny" test has two prongs: the Government's interests must be "compelling," and the method of regulation chosen must be "the least restrictive means" to achieve those compelling interests. 492 U.S. at 126, 109 S.Ct. at 2836. That is the essence of the test, I think.

In this case, the majority views the broadcast media as disfavored in the application of First Amendment rights, relying principally on *Pacifica*; however, my colleagues nonetheless agree that section 16(a) reflects a content-based regulation that is subject to exacting scrutiny. Indeed, even the FCC viewed the case in this way. In my view, there is no way that section 16(a) can survive exacting scrutiny.

A. Content-Based Regulations

In explaining the reasons for applying heightened or exacting scrutiny, the Supreme Court recently stated:

At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.

TBS, ____ U.S. at ____, 114 S.Ct. at 2458. This fundamental principle means that "the First Amendment . . . does not countenance governmental control over the con-

²⁶ The Justices voted 8-1 on this issue, although a majority of the Court found that the regulations were content neutral and applied intermediate scrutiny on this basis. See *TBS*, ____ U.S. at ____, 114 S.Ct. at 2469.

tent of messages expressed by private individuals." *Id.*²⁷ Because section 16(a) and the *Enforcement Order* ban indecent expression,²⁸ they constitute content-based regulations, which have traditionally raised the red flag of exacting scrutiny. As the Court stated in *Sable*, "[t]he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." 492 U.S. at 126, 109 S.Ct. at 2836. At issue in this case is whether the Government's interests are indeed compelling and whether it has chosen the least restrictive means to further its asserted compelling interests.

To withstand constitutional scrutiny, the Government's regulations must serve its interests "without unnecessarily interfering with First Amendment freedoms." *Id.* at 126, 109 S.Ct. at 2836 (quoting *Schaumburg v. Citizens for a Better Environment*, 444 U.S. at 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980)). The First Amendment rights at stake here are those of broadcasters and the adult broadcasting audience. The Supreme Court finds laws insufficiently tailored when they deny adults their free speech rights by allowing them to read, watch, or hear only what was acceptable for children. See, e.g., *Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 525-26, 1 L.Ed.2d 412 (1957); *Sable*, 492 U.S. at 127, 109 S.Ct. at 2837 (finding that "this case, like *Butler*,

²⁷ An earlier Court phrased this notion as: "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972).

²⁸ Section 16(a) applies to "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Enforcement Order*, 8 F.C.C.R. at 705 n. 10.

presents [the Court] with 'legislation not reasonably restricted to the evil with which it is said to deal' ") (quoting *Butler*, 352 U.S. at 383, 77 S.Ct. at 526).

When First Amendment rights are at stake, appellate courts cannot defer to a legislative finding, but must make an independent inquiry to assess whether the record supports the Government's interests. *Sable*, 492 U.S. at 129, 109 S.Ct. at 2838; *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S.Ct. 1535, 1543-44, 56 L.Ed.2d 1 (1978) (assessing legislative finding or "declaration" that clear and present danger existed). The Court has found this "particularly true where the Legislature has concluded that its product does not violate the First Amendment." *Sable*, 492 U.S. at 129, 109 S.Ct. at 2838.

B. Compelling Interests

The FCC claims that section 16(a) serves three compelling governmental interests. The ban is meant, first, to support parental supervision of children; second, to promote the well-being of minors; and third, to preserve the privacy of the home. *Enforcement Order*, 8 F.C.C.R. at 705-06. Only the first two interests are at issue.

With respect to the interest in facilitating parental supervision, the Supreme Court has stated that the law has "consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968). It is entirely reasonable for "[t]he legislature [to] properly conclude that parents and others . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.* Similarly, with respect to the Commission's second interest, protecting the well-being of its youth, the Court on nu-

The second factor contributing to the *Bantam Books* holding was that scheme's failure to provide the merchant with notice that its publications would be listed as objectionable. 372 U.S. at 71, 83 S.Ct. at 639. That same failure does not afflict the FCC forfeiture scheme. The FCC routinely sends the targeted broadcaster both an LOI and an NAL, and after its receipt of each the broadcaster has an opportunity to represent its position to the FCC. SOF ¶ 10-11. The broadcaster and its attorneys also frequently make supplemental written and oral presentations to the Commissioners and other FCC staff members in an effort to persuade the FCC not to issue a forfeiture order. SOF ¶ 11.

The third factor leading to the *Bantam Books* holding was the Rhode Island Commission's failure to explain its categorization of books as obscene or objectionable. 372 U.S. at 71, 83 S.Ct. at 639. This scheme does not share that failing either. Here, the D.C. Circuit already has upheld the FCC's definition of indecent broadcasting, *see supra* p. 6, against overbreadth and vagueness challenges. *ACT I*, 852 F.2d at 1335-40; *ACT II*, 932 F.2d at 1508. The same could not be said of Rhode Island's definition of obscenity. *Bantam Books*, 372 U.S. at 64, 83 S.Ct. at 636. Here, the FCC also must explain why the subject broadcast was indecent before issuing a forfeiture order. 47 U.S.C. § 503(b)(4). No such requirement existed in Rhode Island.

The final factor weighing in against the Rhode Island scheme was that scheme's success at complete suppression of the targeted publications. In *Bantam Books*, the Commission's actions resulted in the complete suppression of the targeted publications. *Bantam Books*, 372 U.S. at 63, 64, 67-68, 71, 83 S.Ct. at 635, 636, 637-638, 639. Unlike the Rhode Island scheme, the FCC's supposed system of informal censorship does not completely ban indecent broadcasts. By its own terms, this scheme allows the broadcast of indecent speech during particular times of the day. As already discussed, the FCC only bans the broadcast of indecent material outside of the "safe harbor" period. Licensees are free to broadcast indecent material at any time between 8:00 p.m. and 6:00 a.m. SOF ¶ 9. Before the FCC even begins investigating an indecency complaint, its staff first determines

whether the broadcast aired outside of that safe harbor. SOF ¶ 9. Any "chill" the plaintiff may feel from forfeiture scheme disappears with the daylight.

Infinity is free from the risk of forfeiture as long as it broadcasts its indecent material during the safe harbor of the evening and early morning hours. The merchants in Rhode Island had no similar respite. This court will not construe the FCC forfeiture scheme as a system of censorship when that system only operates for two-thirds of the broadcasting day.

These distinctions demonstrate that the schemes at issue in *Bantam Books* and this case are not the same.¹⁴ The court cannot, based on *Bantam Books*, construe the FCC's forfeiture scheme as one of prior restraint and censorship. The FCC is enforcing a court-approved definition of indecency through a system that provides for notice and judicial review. This is not the prior review and censorship of broadcast material. This is the FCC's regulation of an industry that serves at the pleasure of the public interest. Plaintiff may feel a chill because of the FCC's forfeiture scheme, but that chill is temporal only and has not been unconstitutionally inflicted. Accordingly, the court grants the FCC's motion for summary judgment on Infinity's constitutional claim and denies Infinity's motion for summary judgment.¹⁵

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, the court concludes that it has jurisdiction only over the constitutional claim asserted, that only Infinity Broadcasting Corporation has standing

¹⁴ The court recognizes that *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C.Cir.1975) questioned whether the FCC forfeiture scheme could be unconstitutional under *Bantam Books*. 515 F.2d at 403. That question was raised in dicta however, and did not address the distinctions this court has drawn.

¹⁵ Because the court concludes that the FCC forfeiture scheme does not constitute a system of prior restraint and censorship this court need not address plaintiffs' due process argument.

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to bring that claim, that the constitutional claim is ripe only as to Infinity, and that the FCC's forfeiture scheme does not violate the First Amendment. An appropriate Order shall issue this date.

ORDER AND JUDGMENT

This case comes before the court on plaintiffs' motion for a preliminary injunction, and plaintiffs' and defendant's cross-motions for summary judgment. For the reasons stated in the accompanying Memorandum Opinion issued this date it is hereby ORDERED that:

1. The court GRANTS the FCC's motion to dismiss count III of plaintiffs' Complaint for lack of subject matter jurisdiction.
2. The court GRANTS the FCC's motion to dismiss the following plaintiffs for lack of standing: Action for Children's Television; the American Civil Liberties Union; the Association of Independent Television Stations, Inc.; EZ Communications, Inc.; Fox Broadcasting Company, Inc.; Fox Television Stations, Inc.; the Motion Picture Association of America, Inc.; the National Association of Broadcasters; the National Association of College Broadcasters; National Public Radio; People for the American Way; Post- Newsweek Stations, Inc.; the Public Broadcasting Service; the Radio- Television News Directors Association; Shamrock Broadcasting, Inc.; the Society of Professional Journalists; 20 South Fork Broadcasting Corporation; and 20th Century Fox Film Corporation.
3. The court GRANTS the FCC's motion to dismiss plaintiff Greater Media, Inc. because Greater Media's claim is not yet ripe.
4. The court GRANTS the FCC's motion to dismiss plaintiff Evergreen Media Corporation based on considerations of comity.
5. The court DENIES the FCC's motion to dismiss plaintiff Infinity Broadcasting Corporation's constitutional claim arising from the 1990 Notice of Apparent Liability.
6. The court GRANTS the FCC's motion for summary judgment on counts I and II of plaintiff's complaint and ENTERS summary judgment for the FCC on those counts, which are hereby DISMISSED WITH PREJUDICE.

7. The court DENIES plaintiffs' motion for summary judgment in its entirety and DENIES plaintiffs' motion for a preliminary injunction as moot. This case now stands DISMISSED.

SO ORDERED.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

47 U.S.C. § 503. Forfeitures

* * * *

- (b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period
 - (1) Any person who is determined by the Commission in accordance with paragraph (3) or (4) of this subsection, to have—
 - (A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;
 - (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order

issued by the Commission under this chapter or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this title; or

(D) violated any provision of section 1304, 1343, or 1464 of Title 18;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II of this chapter, part II or III of subchapter III of this chapter, or section 507 of this title.

(2)(A) If the violator is (i) a broadcast station licensee or permittee, (ii) a cable television operator, or (iii) an applicant for any broadcast or cable television operator license, permit, certificate, or other instrument or authorization issued by the Commission, the amount of any forfeiture penalty determined under this section shall not exceed \$25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$250,000 for any single act or failure to act described in paragraph (1) of this subsection.

(B) If the violator is a common carrier subject to the provisions of this chapter or an applicant for any common carrier license, permit, certificate, or other instrument of authorization issued by the Commission, the amount of any forfeiture penalty determined under this subsection shall not exceed \$100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$1,000,000 for any single act or failure to act described in paragraph (1) of this subsection.

(C) In any case not covered in subparagraph (A) or (B), the amount of any forfeiture penalty determined under this subsection shall not exceed \$10,000 for each violation or each day of a

continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$75,000 for any single act or failure to act described in paragraph (1) of this subsection.

(D) The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written notice. In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(3)(A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of Title 5. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a) of this title.

(B) If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph, after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission, the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

(4) Except as provided in paragraph (3) of this subsection, no forfeiture penalty shall be imposed under this subsection against any person unless and until—

(A) the Commission issues a notice of apparent liability, in writing, with respect to such person;

(B) such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and

(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, who no such forfeiture penalty should be imposed.

Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with which such person apparently failed to comply; (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined under this paragraph shall be recoverable pursuant to section 504(a) of this title.

(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certificate, or other authorization issued by the Commission unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the filed office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required, or is a cable television system operator, if the person involved is transmitting on frequencies assigned for use in a service in which individual station operation is authorized by rule pursuant to section 307(e) of this title, or in

the case of violations of section 303(q) of this title, if the person involved is a nonlicensee tower owner who has previously received notice of the obligations imposed by section 303(q) of this title from the Commission or the permittee or licensee who uses that tower. Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

(6) No forfeiture penalty shall be determined or imposed against any person under this subsection if—

(A) such person holds a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred—

- (i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or
- (ii) prior to the date of commencement of the current term of such license,

whichever is earlier; or

(B) such person does not hold a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.

For purposes of this paragraph, "date of commencement of the current term of such license" means the date of commencement of the last term of license for which the licensee has been granted a license by the Commission. A separate license term shall not be deemed to have commenced as a result of continuing a license in effect under section 307(c) of this title pending decision on an application for renewal of the license.

47 U.S.C. § 504. Forfeitures**(a) Recovery**

The forfeitures provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this title, in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs: *Provided*, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo: *Provided further*, That in the case of forfeiture by a ship, said forfeiture may also be recoverable by way of libel in any district in which such ship shall arrive or depart. Such forfeitures shall be in addition to any other general or specific penalties provided in this chapter. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this chapter. The costs and expenses of such prosecutions shall be paid from the appropriation for the expenses of the courts of the United States.

